

**LUNETA MOTOR COMPANY, PLAINTIFF AND APPELLEE,
VS. ALPONSO LOPEZ, ET AL., DEFENDANTS. ALTO SURETY & INSURANCE CO. INC., SURETY AND APPELLANT.**

G.R. No. L-12343. March 23, 1959

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

From the order of the Court of First Instance of Manila (Civil Case No. 22733) granting the plaintiff-appellee's (Luneta Motor Company) motion for the issuance of an alias writ of execution against the appellant Alto Surety & Insurance Co., Inc., and from the order denying the latter's motion for reconsideration, the surety company has interposed the present appeal.

On June 6, 1953, defendant Alfonso Lopez bought the motor vehicle described in the complaint, and borrowed from the appellee Luneta Motor Company P8,800, which he promised to pay in 15 monthly installments. As security therefore, Lopez executed a chattel mortgage on the same vehicle, said lien being duly registered in the Office of the Register of Deeds of Manila. Lopez made several payments, but defaulted in the sum of P4,630.32. After repeated demands to settle this balance of the indebtedness had been made and disregarded, the company commenced foreclosure proceedings on the chattel mortgage.

On January 2, 1954, before sale at public auction could be made, Lopez together with his co-defendant Faustino Dy (to whom the vehicle was sold subject to the chattel mortgage) effected a settlement with appellee, whereby the two promised to pay, jointly and severally, the unpaid portion of the promissory note. Thereupon, the sale was withdrawn and the truck released to Dy, still subject to the chattel mortgage.

Dy paid the appellee company P1,000, again leaving a balance of P3,827.17 including interest, which amount remained unpaid when the present action was instituted.

Upon petition of appellee and the filing of a replevin bond, the court issued a writ for the seizure of the car. The writ was later recalled upon petition of Dy, who filed a counter-bond in the amount of P12,000 furnished and subscribed by Dy as principal and the appellant Alto Surety & Insurance Co., Inc., as guarantor, under which the latter bound itself to answer, jointly and severally, with defendant Dy, for the delivery of the truck, if "such delivery is adjudged, and for the payment of such sum to him as may be recovered against the defendant and the costs of the action."

On August 10, 1956, the lower court rendered judgment, the dispositive part of which reads:

"In view of the foregoing¹, the court orders defendants Alfonso Lopez and Faustino N. Dy to pay jointly and severally to the plaintiff Luneta Motor Co. the sum of P3,825.17, with 12% interest annually from July 9, 1954, until the whole amount is fully paid, plus 20% of said amount for attorney's fees and plus costs. The chattel mortgage Exhibit "C" is hereby foreclosed.

Once this decision has become final and upon failure of the defendants to pay the said amounts, the Sheriff of

Manila shall proceed to sell the truck in question at public auction as the law directs. For this purpose defendant Faustino N. Dy is ordered to deliver the truck in question to the Sheriff of Manila. The proceeds of said sale shall be applied in satisfaction of this decision. Counterclaim and/or reconvention of defendant is dismissed."

The decision having become final and executory, upon motion of appellee, the lower court, on October 4, 1956, issued a writ of execution against defendants Lopez and Dy. This writ was later returned unsatisfied by the Sheriff of Manila. Accordingly, on June 28, 1957, appellee filed a motion seeking for the issuance of an alias writ of execution against the appellant surety company for the amount awarded in the judgment. This was opposed on the ground, among others, that appellee failed to comply with section 10, Rule 62, in conjunction with section 20, Rule 59 of the Rules of Court. Nevertheless, on February 11, 1957, the lower court ordered the issuance of the alias writ and denied on March 8, 1957, a motion for reconsideration of the same.

The appeal is well-taken. Only one point of law is in issue and it is the propriety of the lower court's action in ordering the issuance of the alias writ of execution against the appellant company, such order having been applied for and granted after the main decision had long become final and executory.

The provisions of the Rules of Court on this point, particularly section 10 of Rule 62, in connection with section 20 of Rule 59, state:

"SEC. 10. Judgment to include recovery against sureties.—The amount, if any, to be awarded to either party upon any bond filed by the other in accordance with the provisions of this rule, shall be claimed, ascertained, and granted under the same procedure as prescribed in section 20 of Rule 59." (Rule 62).

"SEC. 20. Claim for damages on plaintiff's bond on account of illegal attachment.—If the judgment on the action be in favor of the defendant, he may recover, upon the bond given by the plaintiff, damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial, or, in the discretion of the court before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. Damages sustained during the pendency of an appeal may be claimed by the defendant, if the judgment of the appellate court be favorable to him, by filing an application therewith, with notice to the plaintiff and his surety or sureties, and the appellate court may allow the application to be heard and decided by the trial court." (Rule 59) (Emphasis supplied).

Applying the foregoing rules, this Court, in a long line of cases (subsequent to that of *Florentino vs. Domadag*, et al., 45 Off. No. 11, 4937, 4940, promulgated May 14, 1948 cited by the appellee), has held that the above provisions of law are mandatory and require the application for damages against the surety or bondsmen and the award thereof to be made after hearing and before the entry of the final judgment; that if the judgment under execution contains no directive for the surety to pay, and the proper party fails to make any claim for such directive before such judgment had become final and executory, the surety or bondsmen cannot be later made liable under the bond. (*Abelow vs. De la Riva*, et al., supra, p. 159; *Riel vs. Lacson*, L-9863, Sept. 29, 1958; *Port Motors Inc. vs. Raposas*, 100 Phil., 732; 53 Off. Gaz., No. 8, p. 2450; *Visayan Surety & Insurance Co. vs. Aquino*, et al., 96 Phil., 900; *Del Rosario vs. Nava*, 95 Phil., 637; 50 Off. Gaz., [9] 4189; *Liberty Construction Supply Co. vs. Pecson*, et al., 89 Phil., 50; *Aguasia vs. Velasquez et al.*, 88 Phil., 357; *Comments on the Rules of Courts*, Moran, 1957 Ed., Vol. 2, p. 50)

Here, it appears that the application for damages against the appellant surety company and the order issuing the alias writ of execution were made months after the decision had already become final and executory; hence, the alias writ is improperly issued and cannot be enforced against the surety.

Wherefore, the orders appealed from, upon which the alias writ of execution was issued against the appellant Alto

Surety and Insurance Co., Inc. in favor of the appellee Luneta Motor Company, are reversed and set aside. Costs against the appellee. So ordered.

Paras, C.J., Bengzon, Padilla, Montemayor, Reyes, A., Bautista Angelo, Labrador, Concepcion, and Endencia, JJ., concur.

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